

L.D., Appellant

Docket No. 19-0308
Issued: July 24, 2019

**DEPARTMENT OF THE NAVY, NAVAL
HOSPITAL PENSACOLA, FAMILY MEDICAL
CLINIC, Pensacola, FL, Employer**

Case Submitted on the Record

Ronald S. Webster, Esq., for the appellant¹
Office of Solicitor, for the Director

Before:

JURISDICTION

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the October 9, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective August 29, 2016; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals causally related to her accepted employment injuries on or after August 29, 2016.

FACTUAL HISTORY

On January 24, 2011 appellant, then a 53-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on January 19, 2011 she slipped and fell on an unmarked wet floor outside her office door while in the performance of duty. She indicated that the floor was saturated with floor stripper. Appellant alleged injuries to her neck, back, abdominal muscles, right leg, and right foot. She returned to light-duty work on January 20, 2011.

By decision dated May 5, 2011, OWCP accepted appellant's claim for sacroiliitis. Later, on June 15, 2011, it expanded acceptance of appellant's claim to include lumbar sprain.

On August 8, 2011 appellant's attending physician released her to light-duty work four hours per day. On October 28, 2011 appellant's lumbar magnetic resonance imaging (MRI) scan demonstrated superimposed annual tears at L1-2 and L4-5 as well as degenerative disc disease at L3-4.

Beginning November 21, 2011, appellant filed claims for wage-loss compensation (Form CA-7) due to leave without pay for four hours a day. OWCP authorized wage-loss compensation benefits. On May 1, 2012 appellant's physician found that she was totally disabled. On August 15, 2012 OWCP entered appellant on the periodic rolls for total disability.

On April 29, 2013 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Raymond Fletcher, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Fletcher completed a report on May 20, 2013, noting appellant's history of injury and medical history. He determined that her lumbar sprain had resolved, but diagnosed permanent aggravation of the lumbar spondylosis, and lumbar radiculopathy at L4-5. Dr. Fletcher found appellant was unable to return to her date-of-injury position as a licensed practical nurse due to her current work-related lumbar condition and the need for pain medication. In a June 5, 2013 addendum, he opined that she had lumbar residuals from the January 19, 2011 work injury and that she was currently totally disabled due to the need for pain medication.

On October 3, 2013 OWCP expanded acceptance of appellant's January 19, 2011 traumatic injury claim to include urinary complications, permanent aggravation of lumbar spondylosis, and lumbar radiculopathy.

On August 18, 2014 OWCP referred appellant, an updated SOAF, and a list of questions to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 11, 2014 note, Dr. Smith performed a physical examination and diagnosed lumbar sprain, sacroiliitis, lumbar radiculopathy, and urinary complication. He completed a report on September 15, 2014 and listed his objective findings as tenderness and limited range of motion. Dr. Smith found that appellant's aggravation of preexisting lumbar spondylosis required further medical treatment and caused disability for work. He found that appellant was not totally disabled,

but could not return to her date-of-injury position as a licensed practical nurse and suggested a functional capacity evaluation (FCE) to assess permanent restrictions. On October 16, 2014 appellant underwent an FCE which demonstrated that she could work at the sedentary level with maximal lifting and carrying up to 10 pounds, frequent lifting and carrying objects of negligible weight, sitting primarily with brief and intermittent periods of standing and or walking.

In a letter dated July 23, 2015, OWCP authorized Dr. Jeff Buchalter, Board-certified in pain management, to examine appellant due to her request for a change of physicians. In his August 26, 2015 report, Dr. Buchalter noted appellant's history of injury on January 19, 2011 and reviewed her diagnosed studies. He diagnosed L1-2 and L4-5 annular tears, L4-5 disc bulge, history of sacroiliitis, history of lumbar radiculopathy, and permanent aggravation of lumbar spondylosis. Dr. Buchalter found that she could perform sedentary work. On November 4, 2015 he diagnosed chronic pain syndrome, sacroiliitis, spondylitis with radiculopathy, disc degeneration of the lumbar region, muscle spasm, and myalgia. On November 9 and 30, 2016 Dr. Fletcher performed a right lumbar facet injection. On February 24, 2016 appellant underwent a lumbar epidural steroid injection at L5-S1. In a March 23, 2016 note, Dr. Buchalter reported that appellant received no improvement following her last injection. He prescribed chiropractic treatment and massage to improve her pain level.

On May 16, 2016 OWCP referred appellant, a SOAF, the medical record, and a list of questions to Dr. George Andrew Corbett, a Board-certified orthopedic surgeon, for a second opinion evaluation.⁴ In his May 31, 2016 report, Dr. Corbett noted his review of the SOAF, appellant's history of injury, and her diagnostic test results. He performed a physical examination and found brisk reflexes to both the patellar tendon and heel cord. Dr. Corbett found no obvious degenerative joint disease or degenerative disc disease on x-rays. He diagnosed low back pain, undefined etiology. In response to OWCP's questions, Dr. Corbett also diagnosed mild residual right sacroiliitis, but opined that the original contusion had resolved. He found that based on his examination, appellant had no objective findings to support ongoing disability. Dr. Corbett agreed that appellant's work capacity was commensurate with her October 16, 2014 FCE, *i.e.*, sedentary work, lifting and carrying up to 10 pounds, frequent lifting and carrying objects of negligible weight, sitting primarily with brief and intermittent periods of standing and or walking. He also opined that appellant should be able to continue to work in her date-of-injury position as a licensed practical nurse based on his examination.

In a July 14, 2016 note, Dr. Buchalter noted appellant's history of injury and ongoing severe back pain. He reported L1-2 and L4-5 annular tears with probable discogenic pain, myofascial pain, and narcotic dependence. Dr. Buchalter diagnosed chronic pain syndrome, sacroiliitis, spondylitis, panniculitis, muscle spasm and myalgia. He performed trigger point injections.

On July 21, 2016 OWCP proposed to terminate appellant's wage-loss compensation based on Dr. Corbett's opinion. It afforded appellant 30 days to respond if she disagreed with the proposed termination. Appellant responded on August 5, 2016 and disagreed with the proposed termination. She alleged that her continuing back symptoms prevented her from working. Appellant resubmitted test results and a date-of-injury position description, which indicated that

⁴ The SOAF included a description of the physical duties of appellant's date-of-injury position listed as extensive walking, standing, stretching, lifting, and bending in caring for patients, the ability to physically control or defend against emotionally ill or confused patients.

(extensive walking, standing, stretching, lifting, and bending in caring for patients was required, as was the ability to physically control or defend against emotionally ill or confused patients.

By decision dated August 29, 2016, OWCP terminated appellant's wage-loss compensation benefits effective that date based on Dr. Corbett's opinion that she could return to her date-of-injury job. On September 19, 2016 appellant, through counsel, requested an oral hearing, in the form of a telephonic hearing, before an OWCP hearing representative.

In a September 13, 2016 note, Dr. Buchalter reviewed appellant's MRI scan and found multilevel lumbar discogenic changes. He performed a discogram and found disc displacement, disc degeneration, radiculopathy, and low back pain. Appellant also provided several notes from Audrey Sisney, a registered nurse practitioner.

On April 5, 2017 appellant testified before an OWCP hearing representative. She noted that she had not worked since "May of 2011." Appellant described her symptoms of urinary incontinence, constant back spasms, and tingling down her right leg. She noted that she continued to receive treatment from Dr. Buchalter and Ms. Sisney. Appellant asserted that she could not currently perform her date-of-injury position.

On April 24, 2017 appellant resubmitted Dr. Buchalter's July 14 and September 13, 2016 notes and provided a September 4, 2013 report regarding her psychiatric condition as well as notes from Ms. Sisney. On May 3, 2017 she provided an April 28, 2017 MRI scan which demonstrated L1-2 paracentral disc protrusion, mild diffuse disc bulges at L3-4 and L4-5, and minimal annular bulging at L5-S1. Appellant also provided physical therapy notes from Kendra Keyes Metcalfe, a physical therapist.

By decision dated May 16, 2017, OWCP's hearing representative affirmed OWCP's August 29, 2016 termination of wage-loss compensation. She determined that Dr. Corbett's reports constituted the weight of the medical opinion evidence.

In a September 8, 2017 note, Dr. Buchalter examined appellant due to right back and buttock pain. He found right-sided paraspinal spasms. Dr. Buchalter diagnosed intervertebral disc degeneration and lumbar radiculopathy. Appellant submitted an October 6, 2017 note from Ms. Sisney. On December 15, 2017 Dr. Buchalter noted that appellant received over 50 percent relief from her most recent lumbar epidural steroid injection. He continued to diagnose lumbar radiculopathy and performed an additional lumbar epidural steroid injection. On January 10, 2018 Dr. Buchalter diagnosed multilevel lumbar spondylosis and annular tears due to her 2011 employment injury.

On March 7 and May 16, 2018 appellant, through counsel, requested reconsideration of the May 16, 2017 decision. Counsel contented that Dr. Corbett's report was insufficiently detailed and well reasoned to constitute the weight of medical opinion evidence.

In a report dated February 19, 2018, Dr. Buchalter opined that appellant's work-related low back injuries continued to require treatment including injective therapy. He further opined that appellant's FCE established her work restrictions. On May 14, 2018 Dr. Buchalter diagnosed disc degeneration and radiculopathy lumbar region. He provided an injection and medications. Appellant also submitted March 26, and April 27, 2018 notes from Donna L. Garrett, a certified registered nurse practitioner.

By decision dated May 31, 2018, OWCP denied modification of the May 16, 2017 decision. It found that Dr. Corbett's reports were entitled to the weight of the medical evidence and established that appellant had no disability causally related to her accepted January 19, 2011 employment injuries.

In a note dated August 1, 2018, Dr. Buchalter diagnosed lumbar spondylosis with degenerative disc changes and disc protrusion. He indicated that there was no change in appellant's work restrictions. On June 7, 2018 Ms. Garrett completed a treatment note.

On September 13, 2018 appellant, through counsel, requested reconsideration of the May 31, 2018 merit decision. He alleged that there was a conflict of medical opinion evidence requiring an impartial medical evaluation.

In a September 10, 2018 note, Dr. Buchalter diagnosed disc degeneration, lumbar radiculopathy, spondylosis, and sacrococcygeal disorders. He performed a caudal epidural steroid injection.

By decision dated October 9, 2018, OWCP denied modification of the May 31, 2018 merit decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation, effective August 29, 2016.

OWCP accepted appellant's January 19, 2011 employment injury for sacroiliitis, lumbar strain, urinary complications, permanent aggravation of lumbar spondylosis, and lumbar radiculopathy. By decision dated August 29, 2016, OWCP terminated wage-loss compensation benefits for the accepted back conditions, finding that the weight of the medical evidence rested with the second opinion physician, Dr. Corbett.

In his May 31, 2016 report, Dr. Corbett noted reviewing the SOAF, which included the physical requirements of her date-of-injury position as a licensed practical nurse, appellant's history of injury, and her medical test results. Dr. Corbett diagnosed low back pain, undefined

⁵ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *D.A.*, Docket No. 18-0476 (issued October 10, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *R.P.*, *id.*; *D.A.*, *id.*; *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *R.P.*, *supra* note 5; *D.A.*, *supra* note 5; *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

etiology. In response to OWCP's questions, he also diagnosed mild residual right sacroiliitis, but opined that the original contusion had resolved. Dr. Corbett found that based on his examination, appellant had no objective findings to support ongoing disability. He noted that he agreed with appellant's work capacity as detailed in her October 16, 2014 FCE, *i.e.*, sedentary work, including lifting no more than 10 pounds. Dr. Corbett also determined that appellant could accommodate those work restrictions and return to her date-of-injury position as a licensed practical nurse based on his examination.

The Board finds that Dr. Corbett did not provide any medical reasoning or explanation of how he could find both that appellant could only work in accordance with her FCE restrictions and at the same time could return to her date-of-injury position as a licensed practical nurse. The FCE provided that appellant had a lifting restriction of 10 pounds and could perform a sedentary position primarily sitting with brief and intermittent periods of standing and or walking. Alternatively, appellant's date-of-injury position, a licensed practical nurse, required extensive walking, standing, stretching, lifting, and bending in caring for patients, as well as the ability to physically control or defend against emotionally ill or confused patients.⁸

The Board finds that Dr. Corbett's opinions on disability are inconsistent and conclusory in nature and lack sufficient medical rationale to support the termination of appellant's wage-loss compensation benefits.⁹ Dr. Corbett offered no supporting medical rationale to support either of his opinions regarding appellant's ability to work. Due to the internal inconsistencies in Dr. Corbett's report, the Board cannot determine whether it was his considered opinion that appellant could return to her date-of-injury position as a licensed practical nurse.¹⁰ Because his second opinion report failed to provide medical rationale in support of his divergent conclusions, Dr. Corbett's opinion is of diminished probative value and is insufficient to OWCP to meet its burden of proof to justify the termination of appellant's wage-loss compensation benefits.¹¹

The Board thus finds that OWCP has not met its burden of proof to establish that appellant no longer had residuals or disability due to the accepted conditions.¹²

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation, effective August 29, 2016.

⁸ *S.B.*, Docket No. 18-0700 (issued January 9, 2019).

⁹ *Id.*

¹⁰ *D.A.*, *supra* note 5; *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

¹¹ *S.B.*, *supra* note 8; *A.R.*, Docket No. 12-0443 (issued October 9, 2012); *see also P.F.*, Docket No. 13-0728 (issued September 9, 2014); *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report consisting solely of conclusory statements without supporting rationale is of little probative value).

¹² In light of the disposition of the first issue, the second issue regarding appellant's continuing residuals or disability is rendered moot. *M.R.*, Docket No. 17-0634 (issued July 24, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 24, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board